KAYE SCHOLER LLP

ANTITRUST PRACTICE GROUP

MAY 11, 2009

AAG Varney Withdraws Section 2 Report — Promises Active Antitrust Enforcement

Assistant Attorney General for Antitrust Christine A. Varney, marking a clear break with her Bush administration predecessors, officially withdrew the U.S. Department of Justice's 2008 Report on Section 2 of the Sherman Act[1] on May 11, 2009 in her first public remarks since confirmation. In her address, given at the Center for American Progress, AAG Varney declared that the Report "no longer reflects the enforcement policy of the U.S. Department of Justice" and ought not be relied upon by either litigants or the courts.

The 2008 Section 2 Report, among other things, suggested that conduct is unlawful under Section 2 only if it produces anticompetitive effects disproportionate to benefits, and proposed a number of safe harbors. Echoing the Federal Trade Commission's refusal to join the Report, AAG Varney criticized the Report for improperly assuming that it is too hard to distinguish between pro- and anticompetitive conduct by dominant firms, and for wrongly leaping to the conclusion that condemning single-firm conduct under the antitrust laws threatens to over-deter conduct that benefits consumers. In the Report's place, AAG Varney explained, the Department's approach to Section 2, which condemns monopolization, will be guided by the seminal decisions of *Lorain Journal*,[2] *Aspen Skiing*[3] and *Microsoft*.[4]

A Misplaced Faith in Self-Correcting Markets

AAG Varney set this blueprint for renewed, active antitrust enforcement in the context of what she described as a misplaced faith in the market's ability to self-correct. This philosophy, Varney asserted, pervaded not only eight years of underenforcement of the antitrust laws by the U.S. Department of Justice, but also directly contributed to the current worldwide economic crisis. Indeed, Varney suggested, the creation of firms "too big to fail" might be a consequence of failure to arrest anticompetitive conduct and a misplaced faith that claims of plausible efficiencies should be credited over concerns that conduct harms consumer welfare.

More closely aligning the Antitrust Division with the Federal Trade Commission, AAG Varney also stressed that the Division cannot merely play the role of prosecutor, but must set its antitrust enforcement priorities in the context of particular industries and the state of competition within them. AAG Varney also expressed a hope that a renewed willingness of the Department of Justice to consider anticompetitive vertical conduct would reduce the efforts by companies to "forum shop" between U.S. and EU enforcers.

---

1 U.S. Department of Justice: Single-Firm Conduct Under Section 2 of the Sherman Act (2008) (withdrawn May 11, 2009), *available at* http://www.usdoj.gov/atr/public/reports/236681.pdf.

2 *United States v. Lorain Journal Co.*, 342 U.S. 143 (1951).

3 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 858 (1985).

4 *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (*en banc*) (*per curiam*).

Three Pillars of Antitrust Enforcement for the Obama Justice Department

Taking a page from history, the Assistant Attorney General likened the opportunity she confronted to that of Thurman Arnold, who took over the Antitrust Division in the depths of the Great Depression, and guided the Division through what many consider the golden era of antitrust enforcement. It would be a mistake, AAG Varney explained, to view antitrust as antithetical to promoting economic recovery. In that context, she identified three key elements of her enforcement program:

First, antitrust will remain grounded in rigorous economics. AAG Varney stressed, however, that the ultimate goal of antitrust is to further consumer welfare, and that arguments concerning efficiency need to keep this ultimate goal in mind. Varney's remarks suggest that, in the context of both vertical conduct and mergers, potential targets of Antitrust Division investigations cannot assume that even demonstrably efficient conduct will support a conclusion that the conduct is lawful. Her remarks also suggested a commitment by the Antitrust Division to develop "post-Chicago" economics, to seek to convince a largely conservative federal judiciary to accept antitrust liability where, in the immediate past, claims may have been rejected.

Second, AAG Varney stressed that her stewardship of the Division will witness clear and vigorous enforcement of Section 2. Dominant firms that received a pass under the prior administration, she warned, may receive unwanted attention in the current administration. In addition to repealing the Section 2 Report, Varney suggested that the Division will support changing the tone of the Solicitor General's briefs in Supreme Court cases implicating antitrust, and will closely scrutinize the relationship between antitrust and regulation. Particularly given one of her key stated reasons for withdrawing the Section 2 Report – concern that it would influence the courts to issue misguided decisions – one can expect much more advocacy from the Antitrust Division on the side of plaintiffs in vertical cases.

Third, AAG Varney reminded that the Division will continue to emphasize both civil and criminal enforcement under Section 1 of the Sherman Act. Indeed, Varney announced, the Division has established a fund to promote awareness of antitrust in connection with government programs to promote economic recovery.

* * *

The new Assistant Attorney General's remarks did not set out specific enforcement goals, list key industries of concern, or identify any potential new *Microsoft* case. Still, with the abrogation of the Section 2 Report marking one of her first official acts, and an evident skepticism of claims that markets self-correct underlying that decision, it is plain that a new era of active antitrust enforcement at the U.S. Department of Justice has begun. Firms seeking to bring potentially anticompetitive conduct of their rivals or business partners to the attention of the Antitrust Division can expect a warmer reception than in the past eight years, and firms engaging in joint ventures, mergers, or acquisitions can expect their transactions to receive greater scrutiny.